IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 9TH JULY 2007 / 18TH ASHADHA 1929

RSA.No. 1154 of 2006()

AS.147/2001 of III ADDL. DISTRICT COURT, KOLLAM
OS.109/1995 of MUN-MAGI COURT, PARAVOOR

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: APPELLANTS/APLNTS./DEFNDTS.2,3 & ADDL.DEFNTS.4 & 5

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1. SARASWATHI,
   PUTHUVAL PUTHENVILA VEEDU, PANPURATHUCHERRY,
   PARIPPALLY VILLAGE.

2. PADMAKSHI,
   PUTHUVAL PUTHENVILA VEEDU, PANPURATHUCHERRY,
   PARIPPALLY VILLAGE.

3. SANTHA,
   DAUGHTER OF LATE BHAVANI (1ST DEFENDANT),
   JOY VILASOM, PAMPURAM, C.S. JUNCTION,
   PARIPPALLY VILLAGE.

4. SHEELA,
   DAUGHTER OF LATE BHAVANI (1ST DEFENDANT),
   CHAITHRAM VEEDU, -DO- -DO-.

BY ADV. SRI.P.GOPAL

RESPONDENTS: RESPONDENT/PLAINTIFF:

MANOHARAN, S/O.KESAVAN,
KANJIRATHUMMOODU VEEDU, KOTTAKKERATHU CHERRY,
ELAMKULAM, PARIPPALLY VILLAGE.

BY ADV. SRI.P.B.SURESH KUMAR

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 09/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J

S.A..315/1994

JUDGMENT

3.7.2007

M.SASIDHARAN NAMBIAR, J.

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R.S.A.No. 1154 OF 2006

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DATED THIS THE 9th DAY OF JULY, 2007

JUDGMENT

Defendants 1 to 3 in O.S.109 of 1995 on the file of Munsiff Court, Paravur are the appellants. Respondent is the plaintiff. Respondent instituted the suit seeking a decree for fixation of the boundaries separating plaint A and B schedule properties and for recovery of possession of the property in the possession of appellants after demolishing the huts in the plaint C schedule property. Respondent in the plaint contended that plaint A and B schedule properties were purchased by the respondent under Ext.A1 sale deed and since then he has been in possession of the property and the appellants trespassed into the plaint schedule property and they have no right to do so and therefore the boundaries are to be fixed separating plaint A and B schedule properties and respondent is entitled to recover possession of the property trespassed and reduced into possession by appellants. Appellants in their written statement contended that they are in possession of sixty cents of the property as per a mortgage of 1087 ME and the mortgage was not redeemed by the predecessor in interest to the respondent and therefore

respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of PWs 1 to 6 on the side of respondent and DW1 on the side of appellants and Exts.A1 to A22 and Exts.B1 to B4, Ext.X1 and C1 and C2 held that Commissioner has correctly demarcated plaint A and B schedule properties in Ext.C1 and C2(b) plan and fixed the boundaries in accordance with the demarcation of properties as shown in Ext.C2(b) plan. Learned Munsiff also found that respondent is entitled to recovery of possession of plaint A schedule property from appellants after demolishing the hut in plaint C schedule property. Appellants challenged the decree and judgment before District Court, Kollam in A.s.147 of 2001. Learned Additional District Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned senior counsel appearing for appellants and learned counsel appearing for the respondent who appeared consequent to the notice issued before admission, were heard. Learned senior counsel argued that though courts below relied on the decree for redemption, there is no evidence to prove that delivery was taken pursuant to the decree and even though

under Ext.A7 decree and Ext.A6 judgment it was declared that respondent has been in possession of the property, appellants were never dispossessed pursuant to the decree for redemption and their possession was not disrupted and therefore respondent is not entitled to get the decree granted by the courts below. It was further argued that there is no evidence as to when appellants allegedly trespassed into the property and on the evidence courts below should have found that appellants have been continuing in possession under the original mortgage of 1087 ME and respondent is not entitled to the decree sought for. Learned counsel also argued that in any case identity of the plaint A schedule property was not established and in such circumstances courts below should not have granted the decree.

4. Learned counsel appearing for respondent argued that in the light of Ext.A6 judgment respondent is not entitled to contend that they continued possession of the property as that was exactly the question decided in O.S.24 of 1966. It was also argued that once it is found that respondent has been in possession of the property and a decree declaring his possession was granted and the title of respondent is established under Ext.A1, it is for the appellants to establish that the title has been

barred by adverse possession and on the evidence courts below rightly found that respondent has title and is entitled to the decree for recovery of possession sought for. Learned counsel also argued that identity of the property has been concurrently found by the courts below and that factual finding cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure.

5. On hearing learned counsel appearing for appellants, I do not find any substantial question of law involved in the appeal. As far as the identity of the plaint schedule properties are concerned, the trial court as well as first appellate court, on analysing the evidence, found that Commissioner has correctly demarcated the property in Ext.C2(b) plan. That factual finding cannot be interfered by reappreciating the evidence, as sought for by the learned senior counsel. The title of respondent to the plaint schedule properties under Ext.A1, as such, was not disputed. What was contended was that though Ext.A3 decree in O.S. 261 of 1956 was obtained, delivery of the property was not taken as delivery receipt was not produced and as there is no evidence to prove that delivery of the mortgaged property was taken, and it is to be taken that appellants continued in

possession. It was also argued that as there is no evidence to prove that appellants were dispossessed it is to be found that they continued their possession even after Ext.A7 decree and in such circumstances, courts below should not have granted the decree for recovery of possession. True, delivery receipt evidencing delivery of possession pursuant to Ext.A3 decree was not produced. But in the light of Ext.A6 judgment when the possession of respondent was declared by the court in the suit filed against appellants, they cannot be heard to contend that they continued in possession of the property. Under Ext.A6 and A7 decree and judgment in O.S.24 of 1966, competent court has already declared that respondent has title and possession to the property. Though it was challenged in A.S.255 of 1968, as evidenced by Ext.A8 judgment, Ext.A6 judgment was confirmed and that has become final. Appellants are therefore not entitled to contend that in spite of the decree granted in O.S.24 of 1966 they continued their possession. If that be so, appellants could not have been in possession of the property when even A.S.255 of 1968 filed by them was dismissed under Ext.A9 judgment.

6. Once respondent has established his title to the plaint A schedule property, it is for appellants to prove that the title is

barred by adverse possession. In a suit for recovery of possession on the strength of title, plaintiff has no duty to prove in addition to his title that he has been in possession of the property within a period of 12 years as was the case with Article 141 of the Limitation Act 1908. Under Article 64 of Limitation Act 1963, it is for defendants to establish that they have been in possession of the property for more than the requisite period and that too with the animus to possess against the true owner and therefore the title of plaintiff has been barred by adverse possession. The courts below on appreciating the evidence entered a factual finding that appellants did not establish that they have perfected their title by adverse possession. That factual finding also cannot be interferred. There is no substantial question of law involved in the appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR, JUDGE

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